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7 UNITED STATES DISTRICT COURT  
8 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

9	DMITRI VALLERVEICH TATARINOV,	)	Case No. 07cv2033 L (NLS)
10		)	
	Petitioner,	)	
11		)	FEDERAL RESPONDENTS'
	v.	)	RESPONSE IN OPPOSITION TO
12		)	MOTION FOR RELEASE FROM
	SUPERIOR COURT OF THE STATE OF	)	FEDERAL CUSTODY
13	CALIFORNIA, COUNTY OF SAN DIEGO; et al.,	)	
		)	
14	Respondents.	)	

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16 The Federal Respondents oppose Petitioner's motion to release him pending these proceedings,  
17 because the Court lacks subject matter jurisdiction, and because Petitioner does not contend that his  
18 federal custody is unlawful. Petitioner concedes in his motion papers that the Russian government  
19 stands ready to repatriate him but for his own refusal to sign travel documents [Memo of P&A at 6:15-  
20 22] and, now, due to this Court's stay of removal order.

21 As previously argued by the Federal Respondents, this Court lacks subject matter jurisdiction  
22 under 8 U.S.C. §§ 1252(a)(5), (b)(9) & (g), because Petitioner seeks, indirectly, to challenge his removal  
23 order and, directly, to prevent the execution of the removal order. Petitioner is in *federal* custody, but  
24 he is challenging *state* court convictions. Therefore, the only appropriate interim relief would be relief  
25 related to his state court convictions. However, there is no interim relief to grant with respect to the state  
26 court convictions since they have expired.

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Petitioner has already succeeded in obtaining a stay of removal from this Court, based upon his contention that he is challenging his state court convictions and not his removal order. Petitioner should be judicially estopped from now taking a contradictory position. He claims that he is not challenging his removal order (in a thus far successful attempt to avoid the jurisdictional bars of 8 U.S.C. § 1252), and now he seeks interim relief from federal custody which is based entirely upon the fact of his removal order. See Zedner v. United States, 547 U.S. 489, 504 (2006) (“This rule, known as judicial estoppel, ‘generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase’”) (citations omitted); Whaley v. Belleque, -- F.3d --, 2008 WL 763774 at \*4 (9th Cir. Mar. 24, 2008) (quoting Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996)).

Finally, Petitioner does not contend that his federal custody is unlawful, so interim relief in the nature of release from such custody is not appropriate. In particular, he has not alleged that his removal is not significantly likely in the reasonably foreseeable future. See Zadvydas v. Davis, 533 U.S. 678 (2001). On the contrary, he concedes that his own efforts have thus far prevented his repatriation. See 8 U.S.C. §1231(a)(1)(C) (“The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien . . . acts to prevent the alien's removal subject to an order of removal.”); Pelich v. I.N.S., 329 F.3d 1057 (9th Cir. 2003) (alien’s failure to cooperate authorizes continued detention pending efforts to effect removal).

The Court should deny Petitioner’s motion for release from custody, because the Court lacks subject matter jurisdiction and because Petitioner does not contend that his custody is unlawful.

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Respectfully submitted,

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*s/ Samuel W. Bettwy*

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